IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 222 OF 1993.

Shri Nariman Hormusji, since deceased through his legal heirs and representatives; 1A. Smt. Mani Nariman Hormusji, aged 84 years, occ. Housewife,. residing at: Bhiwandi House, 92, August Kranti Marg, Mumbai - 400 036. 1B. Smt. Zarine Rohington Ganjia, age 45 years, Occ. Housewife, r/at Flat No.402, 4th floor, Vatcha Gandhi Building, Vatcha Gandhi Road, Mumbai - 400 007.	]]]]]]]]]]]]]	.. Petitioners Legal heirs of deceased Petnr.

Versus

Behram-Gore Pochkhanwala, only legal heir and representative of deceased Mrs. Khorshed Peshtom Pochkhanawala, residing at Bhiwandi House, 92, August Kranti Marg, Bombay - 400 036.	]]]]]	.. Respondent (Org. Defdt.)

Mr. P.K. Dhakephalkar for the petitioners.

Mr. Milind Jamdar for the respondent No.1.

ALONGWITH

WRIT PETITION NO. 3195 OF 1993

Shri Nariman Hormusji, since deceased through his legal heirs and representatives; 1A. Smt. Mani Nariman Hormusji, aged 84 years, occ. Housewife,. residing at: Bhiwandi House, 92, August Kranti Marg, Mumbai - 400 036. 1B. Smt. Zarine Rohington Ganjia, age 45 years, Occ. Housewife, r/at Flat No.402, 4th floor,	]]]]]]]]]]]]]	.. Petitioners

Vatcha Gandhi Building, Vatcha Gandhi Road, Mumbai - 400 007.] Legal heirs of deceased Petnr.

Versus

Behram-Gore Pochkhanwala, only legal heir and representative of deceased Mrs. Khorshed Peshtom Pochkhanawala, residing at Bhiwandi House, 92, August Kranti Marg, Bombay - 400 036.] .. Respondent (Org. Defdt.)

Mr. P.K. Dhakephalkar for the petitioner.

Mr. M. Jamdar for the respondent No.1.

CORAM: ANOOP V. MOHTA, J.

DATED: 11TH AUGUST, 2005

ORAL JUDGMENT. :

1. Both these Writ Petitions are arising out of a common judgment and order passed by the Additional Chief Judge of Small Causes Court (for short "Appellate Court") at Bombay dated 28th September, 1993, whereby, both the Appeals filed by the common petitioners/heirs of the original petitioner - paying guest - in both these Writ Petitions have been dismissed and confirmed the common judgment and order passed by the Small Causes Court (for short "Trial Court") and resultantly dismissed the Declaratory Suit No. 1590/5450 of 1974 filed by the petitioners and confirmed the suit for

possession filed by the respondent-owner (now deceased) [for short "the respondent-owner"]. Therefore, these two separate Writ Petitions by the common petitioners (heirs) against common respondents (heirs).

2. The premises is a flat on the second floor of Bhiwandi House standing at 92, August Kranti Marg, Bombay - 400 026, which consists of a hall and three bed rooms, a kitchen, bathrooms and WCs. The original petitioner (deceased petitioner) expired on 1/12/2002 The paying guest (petitioners heirs referred as "paying guest"), when he was a bachelor in the year 1958 used to reside with his mother in the suit premises i.e. one big room facing to the road, separate bathroom and lavatory with a common passage and kitchen in the said flat. After marriage, the deceased petitioner has been living with his wife, mother and daughter. There was no written agreement of any kind with the deceased respondent. Mrs. Khorshed Peshtom Pockhanawala. The additional amenities have been provided to use gas for cooking and electricity. The deceased respondent-owner used to charge from the paying guest, 50% of the total monthly gas bill and lump sum of Rs.9/- towards electricity bill. The paying guest used to pay monthly amount of Rs.150/- for the suit premises in addition to the charges referred above, as a "paying guest". The

paying guest used to get the facilities of tea and breakfast, including eggs and bread and butter in the morning and tea and snacks in the evening. There was another tenant Mrs. Kapadia who was also occupying the room as a "paying guest". These two paying guests were enjoying the common facilities including passage, kitchen, WC, as referred above.

3. An Ejectment Application No. 617 of 1961 was filed by the respondent-owner against the other paying guest Mrs. Kapadia, a Parsi woman for recovery of possession of the premises. The deceased petitioner, in support of the other paying guest, as a witness, stated on oath that they are in occupation of the premises as paying guests. The said Ejectment proceedings ended with the recovery of possession of the premises.

4. Sometime in the year 1973, the Advocate of the respondent, through another Advocate, alleged to have threatened the petitioners by Notice dated 12th October, 1973. Therefore, a complaint was lodged against the respondent on 29th October, 1973. Another complaint was lodged on 13th May, 1974, by the deceased-petitioner. relationship. An erstwhile Advocate of the respondent-owner, by letter dated 19th March, 1973, referred the paying guest as sub-tenant. However, the

respondent-owner by written communication resisted the said action of the Advocate Mr. Presswala. The deceased respondent-owner thereafter engaged another Advocate Mr. Desai as the earlier Advocate Mr. Presswala had not acted as per the instructions and authority of the respondent-owner.

5. Sometime in June, 1974, the respondent-owner, therefore, filed an Ejectment Application in the Trial Court for possession of the premises from the paying guest on 10th July, 1974. The petitioners, therefore, to counter attack, filed a declaration suit on 2nd September, 1975 and claimed protection as a licensee tenant, under The Bombay Rents, Hotel and Boarding House Rates Control Act, 1947 (for short "The Bombay Rent Act") as amended under the Maharashtra (Amendment) Act XVII of 1973 and alternatively claimed as a lawful subtenant, and submitted for the protection under the Bombay Rent Act as amended by Maharashtra Act No.XVIII of 1987.

6. Both the proceedings were heard together by the Trial Court. Common evidence was led. The Trial Court held that the paying guest failed to prove that they are in exclusive possession of the premises to claim protection as a licensee and/or sub-tenant. The

respondent-owner proved that the petitioners were permitted to occupy the premises as paying guests on the charge of Rs.150/- per month. The Trial Court, therefore, granted the order of possession in the Ejectment Suit filed by the respondent-owner licensor and dismissed the declaratory suit filed by the paying guest. The Appellate Court, in the Appeals preferred by the parties, framed additional issue with regard to the protection, if any, available to the paying guest as sub-tenant in view of the Amended Act No.VIII of 1987 of the Bombay Rent Act. The paying guest-plaintiff in the declaratory suit had examined himself. Respondent not led any additional evidence. The Trial Court, by order dated 30th January, 1991, based on the additional issue, held that a sub tenancy was created in 1958 itself i.e. prior to 1st February, 1973, and, therefore, extended the protection in view of the provisions of Section 15(2) of the Bombay Rent Act, based on the amended provisions of Maharashtra Act XVII of 1973. The said findings were sent back to the Appellate Court by order dated 30th January, 1991.

7. The Appellate Court, after considering the finding on all the issues, held that the paying guest/ original plaintiff in declaratory suit and respondent in the Ejectment Suit failed to establish that he was the

deemed tenant and/or protected licensee and alternatively, lawful sub tenant. The Appellate Court further held that the respondent/ licensor proved that the paying guest/occupants are in occupation of the premises as paying guests. In the result, the common judgment of the Trial Court dated 22/23rd August, 1984, has been confirmed.

8. Heard the learned counsel Mr. Dhakephalkar for the petitioners and Mr. M. Jamdar for the heirs of the respondent-owner. In support of the petitioner's case, the learned counsel submitted that the Appellate Court was wrong in reversing the finding given by the Trial Court by its order dated 13th January, 1991, whereby, the protection was extended to the petitioners being sub-tenant as contemplated under the amended provisions of the Bombay Rent Act. The admission of the petitioners in the Ejectment proceedings of another paying guest was extracted by the respondent by giving threats and coercion. Therefore, those admissions, as explained and since were given under threats and undue influence, could not have been the foundation for order of eviction. The Advocate Mr. Presswala, on behalf of the respondent, in the notice itself accepted the paying guest as sub-tenants. This should have been taken into consideration to grant protection under the Bombay Rent

Act. The original respondent-owner failed to step in the witness box and examine herself after reference of the matter about sub-tenancy. Therefore, adverse inference should have been drawn against the respondent-owner. The petitioners are in exclusive possession of the premises since the inception and, therefore, the Appellate Court failed to appreciate the evidence and the material on the record. The Appellate Court was wrong in passing the impugned order by overlooking the record, as well as, the provisions of law.

9. Mr. Madhav Jamdar, the counsel for the respondent, however, resisted the same and supported the judgment and order passed by the Appellate Court. He relied on **Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi & Ors.** AIR 1960, S.C., 100 in support of his submission that the paying guest failed to explain the said admission given in the Ejectment proceedings of another paying guest. The said admission, therefore, was conclusive and decisive as the same was not successfully withdrawn or proved to be erroneous. He further relied on **Surendra Kumar Jain Vs. Royce Pereira** (1997) 8, S.C.C., 759 to support his submission based on the Bombay Rent Act and the elaborated terms like "paying guest", "licensee",

"tenant", "sub-tenant" and "premises".

10. The Apex Court in **Surendra Kumar** (supra) has elaborated the relevant provisions as under:

> "10. Section 5(6-A) defines "paying guest" as meaning "a person,not being a member of the family, who is *given* a part of the *premises*, in which *the licensor resides*, on licence".
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> 11. Under Section 5(8), "premises" means "(a) any land not being used for agricultural purpose, (b) *any building or part* of a building let or given on licence separately .... but does not include a room or other accommodation in a hotel or lodging house."
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> 12. Under Section 5(4-A) a "licensee",
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> "in respect of any premises or any part thereof, means the person who is in *occupation of the premises or such part,* as the case may be, under a subsisting agreement *for licence given* for a licence fee or charge; .... *but does not include a paying guest*, a member of a family residing together...."
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> 13. It will be noticed that a "licensee" under Section 5(4-A) is described as a person who is in *occupation* of the premises or such part, under a subsisting agreement for *licence*, given for a licence fee or charge. A "paying guest" is excluded from the definition of licensee and under Section 5(6-A), paying guest is described as a person - not being a member of the family - "who is given a part of the premises, in *which* the licensor residence, on licence." The words "in which the licensor resides" which are found in the definition of "paying guest" in Section 5(6-A) are not found in the definition of "licensee"

> under Section 5(4-A) which uses the words "who is in occupation of the premises or such part", and those words are not found in the definition of "paying guest" in Section 5(6-A) though the words "given on licence" are found in the definition of paying guest. If a person is a "paying guest" and thereby excluded from the definition of licensee then obviously he cannot become a tenant under Section 15-A for Section 15-A requires possession as a licensee on 1-2-1973."

11. After perusal of the record, reasoning and evidence led by the parties, as referred and read out by the respective counsel, I am inclined to accept the finding given by the Appellate Court as the said finding is within the framework of the record, as well as, the related law, as referred above. Those can be crystallized as follows.

12. The learned counsel appearing for the respondent has pointed out a hand sketch map to substantiate his case that there was no exclusive possession of the premises given to the petitioners at any point of time. The Appellate Court has also considered a rough sketch Exhibit-A. There is no dispute about the situation of the premises in question. As evidence and record leads further to justify the case of the landlord that both the paying guests, including the paying guest, were using common kitchen and

lavatory, apart from passage going from the room under occupation of both the paying guests, the toilet/WC were also commonly in use. It is only a part of the flat owned by respondent-owner given in possession and have been under occupation of the paying guest The paying guest was not the family member of the respondent-owner. The respondent-owner was residing in the said flat except the portion and/or rooms in occupation of both the paying guests, including Mrs. Kapadia. The monthly charges of Rs.150/- were exclusive of Rs.9/- as electricity charges and 50% of the bill of gas consumed from the gas burner in the kitchen. This also supports the respondent-owner's case. As recorded above, in the initial days, the paying guest used to get breakfast and morning and evening tea. There are duplicate keys which are in possession of the parties. Therefore, in the light of the above, the Appellate Court was right in observing that the paying guest was in exclusive possession of the suit premises as they claimed. No interest of any kind whatsoever has been created n the premises. After eviction of paying guest, Mrs. Kapadia, or even otherwise, the exclusive use of one bathroom and one lavatory in the flat as sought to be contended, as not proved, cannot be said to be sufficient to accept the petitioner's case of exclusive possession. The premises which are in use is basically

a bedroom. A duplicate key of the main entrance of the flat, if it was provided for convenience, by itself cannot be sufficient to hold that the petitioners have been in exclusive possession of the premises.

13. Merely because after the remand the respondent-owner not led any evidence that itself also cannot be the reason to draw adverse inference. On the contrary, in the present case, based on the existing evidence led by the parties and as borne out from the record and sufficient to hold that the deceased-petitioner is paying guest as contemplated under the Act. The additional evidence led by the petitioners was insufficient to justify their case. In the present facts and circumstances of the case, there is no case made out of adverse interference as sought to be contended by the counsel appearing for the petitioners. In addition to this, the admission given by the deceased paying guest in the Ejectment proceedings initiated by the respondent-owner against Mrs. Kapadia also destroys the case of exclusive possession of the premises and/or any right of protection as licensee and/or subtenant.

14. Except the averments of undue influence and/or coercion and/or threat, the petitioners have been unable

to support such case. The burden lies upon the petitioners to explain and/or prove that the said admission were contrary to the record or facts or made because of threats given by the respondent. The petitioners failed to bring on the record, anything to justify that the deceased-owner or his Advocate threatened him that if he did not give evidence, he would be thrown out of the suit premises. The allegation of undue influence, coercion and threat always need supporting material and evidence from the parties who raises such pleas. The Appellate Court has rightly observed that the petitioners had changed their version in the evidence after reference. There was no such specific pleading raised and proved in the Plaint of the declaratory suit and/or in the point of defence in the Ejectment Application filed by the petitioners.

15. The counsel appearing for the respondent has relied on **Narayan Bhagwantrao** (supra) wherein the Apex Court, after considering Section 31 of the Evidence Act in reference to the term "admission" observed that an admission is the best evidence that an opposite party can rely upon and though not completely is decisive of the matter unless successfully withdrawn or proved erroneous. The Apex Court recently in **Divisional Manager, United India Insurance Co. Ltd. & Anr. Vs.**

Samir Chandra Chaudhary 2005 5 Scale, 470, after considering the case of **Narayan Bhagwantrao** (supra) observed as under:

> "Admission is the best piece of evidence against the person making admission. As was observed by this Court in *Avadh Kishore v. Ram Gopal and Ors.* (AIR 1979 SC 861) in the backdrop of Section 31 of Indian Evidence Act, 1872 (in short the 'Evidence Act') it is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong; but they do raise an estoppel and shift the burden of proof placing it on the person making the admission or his representative-in-interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. As observed by Phipson in his Law of Evidence (1963 Edition, Para 678) as the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. The effect of admission is that it shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true and may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established."

16, In the circumstances, and as observe rightly by the Courts below, the admission given by the petitioner in respect of his occupation and status as "paying guest" in respect of the suit premises, remained

final and binding as the petitioners were unable to explain it to be wrong and to prove it otherwise. Such admission in view of the facts and circumstances, supports the respondent-owner's case about the nature of the deceased paying guest status as the "paying guest" as contemplated under the Bombay Rent Act.

17. In the present case, the possession of the premises in question as given for the occupation of the paying guest, was subject to various conditions and reservation. Therefore, even if licensor or the owner allows the paying guest to use the premises and for convenience, provides them free access or facilities of furniture and/or exclusive door or entry, that itself cannot be a sufficient foundation to determine the exclusive possession for the purpose of claiming tenancy or licensee as sought to be contended by the petitioners.

18. The reference by the Advocate Mr. Presswala to the petitioner as a sub-tenant in the letter/notice, as sought to be contended and strongly relied upon by the petitioners itself is also insufficient to treat the paying guest as sub-tenant or licensee, specially in the present case when the respondent-owner had objected and entered into correspondence to justify that the said

Advocate had never acted in the interest of his client i.e. the respondent-owner. Thereafter, an another Advocate was engaged. Merely because the Advocate Mr. Presswala was not examined by the owner, that itself cannot be the reason to accept the case of the petitioners that the deceased respondent/licensor treated them as sub-tenants or licensees of the suit premises.

19. Both the Courts in the present case, have not considered this submission made by the petitioners to grant them the protection of status as "licensee" and/or "sub-tenant" as contemplated under the Bombay Rent Act. The extract of the Apex Court's decision in **Surendra Kumar** (supra) makes it amply clear that the paying guests like the present ones are not entitled to be treated as licensees. In the present case, the respondent-owner was able to prove the case of paying guests. The petitioners-tenants were also unable to support their case of licensee and/or sub-tenant. Therefore, they are not entitled for any protection as contemplated by the Bombay Rent Act by Maharashtra (Amendment) Act No.XVII of 1973 and Maharashtra (Amendment) Act No.XVIII of 1987 and/or in view of the decision of the Apex Court in **Rusi Dinshawji Vs. Cawasji**. AIR 1987 S.C. 1771. Therefore, their

occupation of the premises as a paying guest in no way grants them such protection.

20. In the light of the above, the reasoning given by the Appellate Court is correct and within the framework of law, as well as, the record. The view, as expressed by the Appellate Court deserves to be maintained. There is no perversity or any illegality to interfere with the finding given by the Appellate Court. For the above reasons, therefore, both the Writ Petitions are dismissed with no order as to costs.

21. However, considering the request made and in view of the fact that the petitioners are in occupation of the premises since 1958 and as pointed out, petitioner No.1A is aged 84 years, I am inclined to grant, as consented, two years' time to vacate the premises on usual undertaking by the petitioners 1A and 1B and by all other adult members, to be filed within two weeks from the date of this order, failing which or in case of filing such undertaking, if there is any breach of any of the terms of the undertaking, the order granting time shall stand vacated and the respondent-owner shall be at liberty to execute the same in accordance with law. The petitioners shall not create any third party interest of any kind in the suit

premises during this extended period.

[ANOOP V. MOHTA, J.]

[srpasha@hc]